

January 1923

Removal from State to Federal Court on Diverse Citizenship—Action Commenced in State Court by Citizen of Another State Against Non-Resident Defendant of State Other than That of Plaintiff—Venue in Removal—Waiver—Ex Parte Wisner and In Re Moore Overruled by Lee v. Chesapeake & Ohio Railway Company

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Recommended Citation

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REVIEW OF RECENT DECISIONS

REMOVAL FROM STATE TO FEDERAL COURT ON DIVERSE CITIZENSHIP—ACTION COMMENCED IN STATE COURT BY CITIZEN OF ANOTHER STATE AGAINST NON-RESIDENT DEFENDANT OF STATE OTHER THAN THAT OF PLAINTIFF—VENUE IN REMOVAL—WAIVER—EX PARTE WISNER AND IN RE MOORE OVERRULED BY LEE V. CHESAPEAKE & OHIO RAILWAY COMPANY.

Upon the question of removal of causes from State to Federal courts on the ground of diverse citizenship where plaintiff and defendant are residents of different States and the action is originally brought in still a different State the cases of *Ex Parte Wisner*, 203 U. S. 449, and *In Re Moore*, 209 U. S. 490, have been controlling up to January 22, 1923, when a decision was handed down by the Supreme Court of the United States in *Lee v. Chesapeake & Ohio Railway Co.* (U. S. Sup. Ct. Adv. Ops. Feb. 15, '23, p. 256), squarely overruling the above mentioned cases.

In the case of *Ex Parte Wisner*, a citizen of the State of Michigan brought an action against a citizen of the State of Louisiana in the Circuit Court of St. Louis, Missouri. Defendant, a citizen of Louisiana, petitioned to remove the cause from the State Court into the Circuit (now District) Court for the Eastern Division of the Eastern District of Missouri, on the ground of diversity of citizenship. An order of removal was thereupon entered by the State court, and the transcript of record was filed in the Circuit Court of the United States. Plaintiff, citizen of Michigan, filed a motion to remand the case to the State court.

In that case it was held that under the provisions which are now embodied in sec. 51 of the Judicial Code "an action commenced in a State court, by a citizen of another State, against a non-resident defendant who is a citizen of a State other than that of the plaintiff cannot be removed by the defendant into the Circuit (now District) Court of the United States." It was also held that the provision embodied in sec. 51 of the Judicial Code, respecting the venue of actions originally begun in the Circuit (now District) Courts, was strictly jurisdictional, could not be overcome even by consent of both parties, and affected removals accordingly.

The decision in *Ex Parte Wisner* seems to have been somewhat modified by the later case of *In re Moore*. Moore, a citizen of Illinois, by his next friend, brought an action against the Louisville and Nashville Railroad Company, a citizen of Kentucky, in the Circuit Court at St. Louis, Missouri. Before answer was due, however, the defendant, citizen of Kentucky, filed its application for removal to the Circuit (now District) Court of the United States for

the Eastern Division of the Eastern Judicial District of Missouri, on the ground of diverse citizenship.

In this case, however, the plaintiff, after removal, instead of objecting to the jurisdiction of the Federal Court, as did the plaintiff in *Ex Parte Wisner*, filed an amended petition. It was held that he thereby consented to accept the jurisdiction of the United States Court.

From the two cases just considered it would seem that a citizen of a State who is sued in a State court, in a case involving diversity of citizenship, in a district outside that of the residence of the parties, may and does consent to the jurisdiction of the Federal court by filing his petition for removal; that the plaintiff may thereupon, if he desires, file his application to remand the cause; and that if he does not do so, but appears in the Federal court without objecting and submits himself to its jurisdiction the court may validly proceed with the cause.

The law set forth above in *Ex Parte Wisner* and *In re Moore*, which had been controlling, was overruled by the decision in the case of *Lee v. Chesapeake & Ohio Railway Company*, on Jan. 22, 1923. In that case, plaintiff, a citizen of Texas, brought an action against the Chesapeake & Ohio Railway Company, a corporate citizen of Virginia, in a State court in Bracken County, Kentucky. Upon petition by defendant the case was removed to the District Court of the United States for the Eastern District of Kentucky on the ground of diverse citizenship. When the transcript reached the District court, the plaintiff moved that the cause be remanded to the State court on the ground that the District court was without jurisdiction, in that neither party was a resident of that district. The motion was overruled, the plaintiff elected to stand on the motion, and judgment was given for the defendant. The case was then taken to the Supreme Court of the United States on a direct writ of error to obtain a review of the ruling on plaintiff's motion to remand. In the said Supreme Court the judgment for defendant was affirmed.

Mr. Justice Van Devanter, who delivered the opinion of the court, first points out that under sec. 24 of the Judicial Code, District courts have original jurisdiction over two distinct classes of suits and that the diverse citizenship and amount involved in the present case bring it within one of those classes and therefore within the general jurisdiction of the District courts. In referring to sec. 51 of the Code the Justice says (citing authorities), "this provision does not limit the general jurisdiction of the District courts, or withdraw any suit therefrom, but merely confers a personal privilege on the defendant, which he may assert or may waive, at his election, and does waive, if when sued in some other district he enters an appearance without claiming his privilege." Sec. 28 of the Code provides that "any other suit of a civil nature, at law or in equity, of which the District courts of the United States are given jurisdiction by this title, and which are now pending or may hereafter be brought, in any State court, may be removed into the District Court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State." The question arises—what is meant by the words "for the proper district" in sec. 28? They find exact definition in secs. 29 and 53 of the Code, and that definition conforms to what has appeared in all removal statutes beginning with the orig-

inal Judiciary Act of 1789. Sec. 29 deals, among other things, with the venue on removals and shows that the removal must be into the District court "in the district where such suit is pending." This requirement is emphasized by sec. 53 which provides that where the district is composed of two or more distinct divisions the removal shall be into the District Court "in the division in which the county is situated from which the removal is made." In the case of *General Invest. Co. v. Lake Shore & M. S. R. Co.*, 43 Sup. Ct. Rep. 106, it was reasoned that sec. 51 did not withdraw any suit from those of which the District court was given original jurisdiction by sec. 24 but that sec. 51 merely regulates the place of suit, its purpose being to save defendants from inconveniences to which they might be subjected if they could be compelled to answer in any district, or wherever found. It affords defendants a privilege which they may, and not infrequently do, waive. Mr. Justice Van Devanter, in referring to the removal section, sec. 28, says that: "it applies to the jurisdiction conferred on the District courts in general, for it speaks of them in the plural. That it does not refer to the venue provision in sec. 51 is apparent because that provision does not except or take away any suit from the general jurisdiction conferred by sec. 24 and because there could be no purpose in extending to removals the personal privilege accorded to defendants by sec. 51, since removals are sought only by defendants, and lastly since the venue on removal is specially dealt with by sec. 29. From the above reasoning it would seem that the plaintiff's assent is not essential, in any sense, to the exercise of the right of removal, nor can he urge that the removal be into the District Court for some other district, for it is his act in bringing the suit in the State court within the particular district which fixes the venue on removal. It was on application of the above views to the case of *Lee v. Chesapeake & Ohio Railway Company* which caused the Supreme Court of the United States to hold that said case was duly removed into the District Court for the proper district, and that the motion to remand was rightly denied—briefly, that the District Court had jurisdiction to proceed to a determination of the cause.

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- MEANING OF "PROMISSORY NOTE" IN REVENUE ACT OF 1918—DOES STAMP TAX ON SUCH NOTES ALSO APPLY TO PURCHASE AGREEMENT CONTRACTS?—IT DOES NOT—IT APPLIES ONLY TO SUCH COMMERCIAL PAPER AS SHOWS UPON ITS FACE THE FORM OF A PROMISSORY NOTE.

In order to properly understand the case of *Haverty Furniture Co. v. The United States* (United States District Court, Northern District of Georgia, also found in *Corporation Trust Company 1923 War Tax Service*, paragraph 4028), it will be necessary to briefly summarize the facts as stated by Samuel H. Sibley, J., in delivering the opinion of the court.

This was an action by the plaintiff, the Haverty Furniture Company, to